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IN THE

Supreme Court of the United States

October Term, 1966

NO. 1249

GRAHAM BOBBITT BALL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Graham Bobbitt Ball, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 25, 1966, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated March 25, 1966, has not been reported to date. This opinion appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals is dated March 25, 1966, and was entered on the same date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether Federal Statute permits a Federal Judge to conduct a hearing without notice to the probationer of the terms of probation that he is charged with violating and thereafter revoke his probation because probationer made immaterial and erroneous statements to the court because of lack of notice?

2. Whether Federal Statute permits a Federal Judge to revoke a probation upon evidence that consists entirely of gossip and hearsay of a nonfactual nature?

STATEMENT OF CASE

Jurisdiction of the District Court of the Eastern District of North Carolina was invoked because petitioner was charged with violations of a Federal Internal Revenue Act.

The defendant pled guilty to a violation of the Internal Revenue Liquor Laws and specifically to Title 26 USC Section 7206 (4) on two counts and received a sentence of three years and a $5,000 fine on the first count and a sentence of one year and a $5,000 fine on the second count with the prison sentence in count two to begin at the expiration of prison sentence of count one. The execution of the prison sentences was suspended and the defendant placed on probation for a period of five years under general conditions as recorded in the Clerk's office and a special condition that he pay fines imposed, aggregate the sum of $10,000 on or before December 1, 1962. Appellant's appendix pp. 1A-2A.

The defendant paid his fine in the aggregate of $10,000 and the record shows that it was understood that he also pay a $5,000 fine of a co-defendant which was also paid. Appellant's appendix pp. 6A, 14A.

On August 12, 1964, a hearing was had in Raleigh, N. C.,

before the Honorable Algernon L. Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina, on the motion of the probation officer for revocation of the probation of the probationer, Graham Bobbitt Ball. Appellant's appendix pp. 6A-23A.

At the hearing in Raleigh on August 12, 1964, the probationer did not have notice of what terms of the probation he was supposed to have violated and in explaining to the court his condition on June 8, 1964, he inadvertently made immaterial erroneous statements due to lack of opportunity to refresh his recollection. Appellant's appendix pp. 11A, 12A, 13A, 14A.

The evidence at the hearing on August 12, 1964, on the part of the government was based entirely on anonymous reports that in themselves were mere gossip and not even of a factual nature (Appellant's appendix p. 7A) whereas the probationer presented evidence of a factual nature by persons who were beyond reproach that showed that there was no basis for a revocation of his probation (appellant's appendix pp. 15A-21A) and on the basis of the evidence heard at the August 12, 1964, hearing, Chief Judge Algernon L. Butler, entered an order refusing to revoke the probation of the probationer. Appellant's appendix pp. 22A, 23A.

On June 3, 1965, the probation officer again moved for revocation. Probation Officer Huggins admitted that no additional acts of misconduct had been reported to him since the hearing on August 12, 1964. Appellant's appendix p. 37A.

At the hearing on June 3, 1965, the Court rendered a judgment and order of commitment wherein it found that the probationer had violated the terms and conditions of the probation judgment in that he had (1) failed to follow the probation officer's instructions and advice (2) had violated a State law (3) had failed to keep good company

(4) had misrepresented the facts as presented to the Court during a violator's hearing on August 12, 1964, and ordered that the probation sentence heretofore granted be revoked and in lieu thereof the probationer was ordered committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for a period of four years and pursuant to provisions of Title 18 USC, Section 3651, the defendant is to serve six months, execution of the remainder of the prison sentence suspended and the defendant placed on probation for two years, probation period to begin at the expiration of the active prison sentence. Appellant's appendix pp. 4A, 5A.

The aforesaid judgment and commitment of the defendant was entered on June 11, 1965, and the probationer duly filed notice of appeal on June 16, 1965, to the Circuit Court of Appeals for the Fourth Circuit.

The Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court stating:

> "We are not persuaded that the court abused its discretion" and "All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation."

Relevant Facts

The general conditions of probation on file with the Clerk of the United States District Court of the Eastern District of North Carolina among other provisions provide that a probationer shall: (a) refrain from the violation of any State and Federal penal laws (b) live a clean, honest and temperate life (c) keep good company and good hours (h) follow the probation officer's instructions and advice. Appellant's appendix p. 3A.

Although not officially shown it is uncontradicted that the probationer paid with knowledge of the Court another $5,000 fine of a co-defendant in this case. Appellant's appendix p. 14A. The probationer has therefore paid a total fine of $15,000 in this action.

The charge upon which the defendant was convicted upon his plea of guilty was for violation of the Internal Revenue Liquor Laws and it is uncontradicted that there is absolutely no evidence or report that this probationer from the date of his sentence on June 8, 1962, has had anything at all to do with the sale or manufacture of liquor and that the main object of his punishment has without doubt been effected. Appellant's appendix p. 22A.

At the hearing on August 22, 1964, upon motion of the probation officer for revocation of the probationer's probation, the probationer, Graham Bobbitt Ball, produced nine witnesses all of whom were persons of good character and reputation in the community and all of whom knew the probationer, Graham Bobbitt Ball well and all of whom were present to state and did state by stipulation that the probationer, Graham Bobbitt Ball, had the general reputation in the community in which he lived of being a good and law abiding citizen since the date of his sentence on June 8, 1962. The probationer's near neighbor, Mr. Schmidt, took the stand and under oath testified that he is the Treasurer of Cedar Rock Church and has been for a number of years, and has been a member of the Board of Deacons of that Church and that his wife teaches school in Franklin County and has taught school in that county for about 14 years. That he lived about 100 yards on the other side of the road from the probationer and that he saw him practically every day and sometimes three, four or five times a day and that since probationer had been placed on probation in June, 1962, he did not know of any occasion when the probationer had been drinking or associating with

undesirable people. That the nature of his conduct had been extremely good. That on one occasion, he happened to be with the probationer on the tobacco market and the probationer had offers of whiskey and turned them down and he had heard Mr. Ball state that he did not want any mess around his store on account of his being on probation. Appellant's appendix pp. 15A-22A.

The evidence is uncontradicted that the probationer has worked hard and steadily all during the time he has been on probation and cultivates 37 acres of tobacco, 64 acres of cotton, 102 acres of corn, 32 acres of grain and has 17 curing barns for tobacco and 5 tenants. In all he has 27 people to look after, feed, supply and direct their work. All of this in addition to the store that he runs. Appellant's appendix p. 17A.

Mr. Huggins, a probation officer, reported that he had interviewed about a dozen people whom he did not name and that it was common talk around the neighborhood stores that the probationer had been doing some drinking from June 5, 1964, on into June 8, 1964, and that he had been driving some while drinking. Appellant's appendix p. 7A.

Probation officer Huggins also reported that a fight took place between Johnson Nash and Roy Overton at the defendant's store on June 7, 1964, and that the probationer broke it up and separated the two. Appellant's appendix p. 7A. Probation officer Huggins also reported that on the same date of June 7, 1964, James Lancaster picked up the probationer at his home and drove him to a filling station in Louisburg, N. C. The officer also stated that Johnson Nash and Clarence Bailey were also in the automobile in which the probationer rode with Lancaster to Louisburg. Mr. Huggins also stated that James Lancaster, Johnson Nash and Clarence Bailey were persons of bad character and reputation. However, he did not state that the probationer had been seen with them on any other day other than on

June 7, 1964, or that probationer had known any of these persons for any appreciable length of time or that he had any knowledge of their character, reputation or record. Appellant's appendix pp. 7A-8A.

Probation officer Huggins also testified that at the filling station in Louisburg James Lancaster got into a fight with Woodrow Medlin who was the operator of the station and was an active probationer. The probationer Ball was again the peacemaker and separated the two fighters. The police were called and that Bailey was placed under arrest and charged with public drunkenness. There were no charges filed against the probationer Ball. Appellant's appendix p. 8A.

The probationer introduced into evidence the affidavit of the arresting officer at the service station in Louisburg, N. C., that the probationer Graham Bobbitt Ball, was not involved in the altercation between Woodrow Medlin and James Lancaster and that on said occasion the probationer did not appear to be under the influence of any intoxicant whatsoever and appeared to be normal and that he did not smell the odor of alcohol on the probationer. Appellant's appendix pp. 11A-12A.

Probation officer Huggins further reported that on June 8, 1964, which was a Monday, the probationer was found slumped over his automobile with the motor running on a hardtop road some two miles from his home. There was no evidence that anyone smelled any intoxicating beverages on the probationer or that he had been drinking or any evidence whatsoever to indicate what his condition was or that he had been driving in any such condition. Probationer told the officer that he was not drinking but that he was under heavy sedation, having previously gone to the dentist on that date. Appellant's appendix p. 9A.

Neither the probationer nor his attorneys had any knowledge of any of the charges except the altercation at the filling

station in Louisburg, N. C., and therefore the probationer was called upon without any prior notice to give the details of his severe toothache which commenced on early Saturday morning June 6, 1964, and continued even after the extraction on the night of June 8, 1964, which was a Monday. Appellant's appendix pp. 11A, 12A, 13A.

Neither the probationer nor his attorneys had any chance at all to check upon the record or the facts and therefore there was confusion in the mind of the probationer and his Attorney, Mr. Yarborough, who did most of the talking to the Court concerning the matter and through Mr. Yarborough, his attorney, the Court was informed that the probationer visited a dentist on Saturday and that he had taken pills bought through a prescription. Mr. Yarborough, the probationer's attorney, repeatedly reminded the court that neither he nor the probationer had had any opportunity to check into the matter. Appellant's appendix pp. 11A, 12A, 13A.

The probationer stated that the dentist pulled the tooth at about 10:30 or 11 o'clock on Saturday night which was June 6. Appellant's appendix p. 14A. The probationer also stated that his wife took him to the hospital and they pulled out a piece of bone Appellant's appendix p. 13A, and he had been taking pills every four hours. Appellant's appendix p. 13A.

After hearing the evidence on August 22, 1964, the Judge denied the motion for revocation and continued the probationer on probation. Appellant's appendix pp. 22A-23A.

The probation office of the United States District Court of the Eastern District of North Carolina made a further report concerning this matter on June 3, 1965, in Clinton, North Carolina, at which time a hearing was heard for the purpose of receiving the report of the probation officer and such further evidence as might be presented for further

consideration of the motion of the probation office for revocation of probation. Appellant's appendix p. 23A.

At this new hearing probation officer Huggins stated that there had not been any reports of any drinking or any indication of any antisocial actions on the part of the probationer since the hearing on August 12, 1964. Appellant's appendix p. 34A. However, Mr. Huggins, stated that he examined the records in Doctor Eakes, the dentist's office, and the records showed that Doctor Eakes extracted the probationer's tooth on June 8, 1964, and that Doctor Eakes remembered extracting the tooth at approximately 8:30 in the evening on June 8, 1964, and that there was no other record of any services performed in the office of Doctor Eakes. And that the records at Pleasant's Drugstore disclosed that a prescription was filled on the evening of June 8, 1964, for the probationer at which time upon the prescription of Doctor Eakes a narcotic drug known as nembudine was sold and introduced a photostatic copy of the same. Appellant's appendix pp. 23A-24A.

Doctor Eakes, the dentist, after being duly sworn, testified that although the tooth was extracted on Monday, June 8, 1964, after 9 o'clock p.m. that the probationer did come by his home on Saturday morning, June 6, at about 6 to 6:30 a.m. and at a time when he hadn't gotten up and had time to dress and eat and that he probably gave him a prescription and he didn't come back until the night of the 8th. That he only works at night in cases of emergency and that night he removed an upper left molar from the probationer. It was a rather hard extraction and the clot had come out and had to be treated and the probationer was under treatment of Doctor Eakes until June 14. Appellant's appendix pp. 24A-27A. The probationer introduced the uncontradicted affidavits of registered pharmacist A. C. Gupton and Mrs. James Edwards, the bookkeeper of Harris Pharmacy, and according to their uncontradicted affidavits,

the Harris Pharmacy sold to the probationer on June 6, 1964, APC tablets upon the prescription of Doctor Spurgeon E. Eakes. Appellant's appendix pp. 29A-31A. APC capsules contain five grains of aspirin, phenacetin, and caffine and are stronger than Anacin. Appellant's appendix p. 29A.

The probationer after being duly sworn testified that at the August 12 hearing in Raleigh that he made a mistake because he didn't have time to check on it. That now after he has had time to check on it he found that the doctor pulled his tooth on June 8. However, he did go to the dentist in the early morning hours of June 6, 1964, and did have a prescription filled which was given to him by Doctor Eakes. That it was filled at the Harris Pharmacy in Louisburg. That since that time and date he was taking the pills gotten from the Harris Pharmacy for his tooth along with Anacin and Aspirin and BC's which the probationer got from his store and there at his house. That on Monday night, June 8, the tooth started back to hurting again. That he went back to Doctor Eakes on the following Wednesday because he felt something with his tongue that felt like a bone. That his wife pulled out the piece the probationer thought was a bone with some eyebrow tweezers. That Doctor Eakes prescribed some narcotic pills to him after the tooth extraction. Appellant's appendix pp. 31A-34A.

The probationer stated that he did not know what caused Overton and Nash to have an argument there at the probationer's store on Sunday around 12:30 or 1:00 o'clock p.m., however, the probationer broke up the fight and separated them. Appellant's appendix p. 34A.

That on the afternoon when James Lancaster came by the probationer was informed by Lancaster that he wanted to go to probationer's store and get something. However, the probationer told him that the store was closed but Lancaster insisted on going there and the probationer got into Lancaster's automobile thinking that he was merely

going to the store to wait on his customer. However, instead of going to probationer's store, Lancaster instructed a colored man who was driving to drive on down the road and didn't let him stop. The probationer protested that he had to go home but Lancaster did not stop until they got to Louisburg and Medlin's service station. At the service station Medlin and Lancaster got into an argument and fight while the probationer was in the men's rest room and the probationer broke it up. Appellant's appendix pp. 34A-36A.

REASONS FOR GRANTING WRIT

The decision of the Circuit Court of Appeals raised important and disturbing questions of federal law which have not been, but should be, scttled by this court.

(1) The Federal Statute does not allow a Federal Judge to conduct a hearing without notice to the probationer of the terms of the probation that he is charged with violating and thereafter revoke his probation because probationer made immaterial and erroneous statements to the court because of lack of notice.

The probationer's probation was revoked under authority of 18 USC 3653, which in the last paragraph thereof reads as follows:

> "As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed."

The above named statute was formerly 18 USC 725 which provided that upon arrest of a probationer "such probationer shall forthwith be taken before the court."

While 18 USC 725 was still in full force and effect, the Fourth Circuit Court of Appeals in the case of *Hollandsworth v. United States,* 34 F 2d 423, held that a probationer could not be sentenced until he had been given notice of the specific charge and an opportunity to be heard in his defense. In *Furrow v. United States,* 46 F 2d 647, the Fourth Circuit Court of Appeals held that the notice did not have to be in writing.

This court in *Burns v. United States,* 287 US 216 and in *Escoe v. Zerbst,* 295 US 490, while former statute 18 USC 725 was still in force and effect, construed the provision "Such probationer shall forthwith be taken before the court" to not require "formal" notice or specification of charges without specifically overruling *Hollandsworth v. United States,* supra.

It is respectfully submitted that in the case of *Burns v. United States,* supra, there was actually no question of notice involved and in the case of *Escoe v. Zerbst,* supra, the sole question involved was whether the probationer was entitled to a hearing. In the case of *Burns v. United States,* supra, the court said:

> "There is properly speaking no question here of notice. . . ."

All that *Burns v. United States,* supra, did actually say was that the notice or specification of charges need not be formal. For this court said:

> "The question, then, in the case of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges."

Congress did not change the word "forthwith" in the statute as formerly written to "speedily" as now written without intent to make a change in the requirements of the statute. It is submitted that Congress in making this change

intended that the summary nature that was inherent in the words "that the probationer shall forthwith be taken before the court" no longer be included in the statute and since no decision of this court has been rendered on the question of notice since *Burns v. United States,* supra, and *Escoe v. Zerbst,* supra, it is important not only to the petitioner but to others that this court re-examine these two decisions in reference to their applicability to Title 18 USC 3653 and establish a guiding rule as to notice to the probationer of the terms of the probation that he is charged with violating prior to hearing.

It is respectfully submitted that the decisions of *Burns v. United States,* 287 US 216 and *Escoe v. Zerbst* never were intended to infer that the probationer was not entitled to notice of the charges against him which would be adequate to allow the probationer to explain away the accusation. The cases have merely held that formal notice was not necessary and in the case of *Escoe v. Zerbst,* the court said:

> "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation."

The court further said:

> "When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal."

At the hearing on June 3, 1965, no additional facts were presented that were not presented at the August 12, 1965, hearing except evidence as to whether the probationer had misstated facts at the August 12, 1964, hearing concerning the details of a severe toothache which commenced on early Saturday morning June 6, 1964, and continued even after the extraction on the night of June 8, 1964, which was a Monday. Appellant's appendix pp. 11A, 12A, 13A. The probationer's attorney, repeatedly reminded the court that

neither he nor the probationer had any opportunity to check into the matter. Appellant's appendix pp. 11A, 12A, 13A.

The probationer's statement was an explanation of why he was seen on the morning of June 8, 1964, slumped over the steering wheel of his car. The true facts as shown at the June 3, 1965, hearing Appellant's appendix pp. 31A-34A are more favorable to the probationer than those stated by him on August 12, 1964.

It is obvious that the statement of the probationer at the hearing on August 12, 1964, was nothing more than a mere erroneous statement of immaterial facts due entirely to lack of notice and knowledge on the part of the probationer and his attorneys as to what the charges were against him.

The decision of the court below completely disregarded the petitioner's right to a sufficient notice of the charges against him and in order to preserve the petitioner's right which has been disregarded and to decide an important question of federal law which has not been, but should be settled by this court, a review of the decision below is a requisite.

(2) The Federal Statute does not permit a Federal Judge to revoke a probation upon evidence that consists entirely of gossip and hearsay of a nonfactual nature.

In the case of *Escoe v. Zerbst,* 295 US 490, this court said:

> "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. . . . It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. Ibid. That much is necessary, or so the Congress must

have thought to protect the individual against malice or oppression."

However, a guiding rule has not been established by this Court that would require the trial judge to at least base his decision upon some evidence other than gossip and nonfactual hearsay and it is important not only to petitioner but to others that a guiding rule be established. It is respectfully submitted that because of the absence of a guiding rule in the foregoing decision and also *Burns v. U. S.*, 287 US 216, the court of appeals affirmed the judgment of the District Court and in effect decided erroneously that under Title 18 USC 3653 that a Federal Judge may revoke a probation upon evidence that consists entirely of gossip and hearsay evidence of a nonfactual nature.

The petitioner submits that this court in *Burns v. U. S.* supra, and in *Escoe v. Zerbst,* supra, never intended that the discretion of the Federal Judge in the revocation of probation should not be based on some evidence other than gossip and nonfactual hearsay.

In addition to misrepresentation of facts to the court as discussed in Point 1 the court gave as grounds for revoking the probation that probationer had (1) failed to follow the probation officer's instructions and advice, (2) had violated a State law (3) had failed to keep good company. Appellant's appendix p. 4A.

There was no evidence that the probationer failed to keep good company. The only evidence that he was in association with any persons of bad character and reputation and criminal record was that of a temporary association necessary to carry on his business as a storekeeper. Appellant's appendix pp. 7A, 8A.

The only evidence that the probationer had violated State law was that the probationer was found slumped over his automobile with the motor running on a hardtopped road

some two miles from his home. Appellant's appendix p. 9A. There was no evidence that anyone smelled any intoxicating beverages on the probationer's breath or that he had been drinking. There was no evidence whatsoever to indicate what his condition was or that he had been driving in any such condition and it is respectfully submitted that there is not a solicitor in the State of North Carolina who would have the temerity to go into court and prosecute a "driving under the influence case" on the sole evidence that a person was found slumped over a parked automobile without any evidence whatsoever that he had been drinking or that intoxicants were smelled on his breath or that he had been using narcotic drugs.

The only indication that probationer had failed to follow the probation officer's instructions and advice and violated State law is shown in appellant's appendix p. 7A in which the probation officer stated that he had interviewed approximately a dozen people be considered to be reliable and that they told him "it appeared that Graham Bobbitt Ball started drinking sometime on June 5, 1964, a Friday, and had been doing some drinking throughout the weekend on into June 8, 1964, Monday. It was common talk around the neighborhood stores and so forth that he had been drinking and driving some." Appellant's appendix p. 7A.

The decision of the court below completely disregarded the petitioner's right to have the revocation of his probation based on facts other than gossip and nonfactual hearsay evidence and in order to preserve the petitioner's rights which have been disregarded and to decide an important question of Federal Law which has not been, but should be, settled by this court, a review of the decision below is a requisite.

CONCLUSION

For the foregoing reasons a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,167.

United States of America,
Appellee,

versus

Graham Bobbitt Ball,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALGERNON L. BUTLER, DISTRICT JUDGE.

(Argued November 1, 1965. Decided March 25, 1966.)

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and MICHIE, District Judge.

Irvin B. Tucker, Jr., (Hill Yarborough on brief) for Appellant, and Gerald L. Bass, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

Appellant Ball contends that the District Court erred in revoking probation granted him subsequent to his conviction and sentence for violation of the Internal Revenue (Liquor) Laws.

A hearing on a motion of the probation officer for revocation of Ball's probation was first held by the District Court on August 12, 1964.[1] At that time, the probation officer charged Ball with having breached three conditions of his probation by (1) violating state penal laws, (2) failing to live a clean and temperate life, and (3) failing to keep good company.

The probation officer reported that it was common knowledge in the community that Ball had been drinking and driving while under the influence of alcohol during a period extending from June 5, 1964, to June 8, 1964. He based this conclusion upon disclosures made to him by approximately a dozen persons whom he considered to be reliable sources of information. The officer stated that about one year earlier he had warned Ball about drinking after receiving similar reports.

The probation officer stated that an altercation occurred at a store operated by Ball on June 7, 1964, between two persons named Nash and Overton and that Ball separated them. He further reported that later on that same day Ball traveled to Louisburg, North Carolina, in company with Nash and two other persons, Lancaster and Bailey. Lancaster got into a fight there with a service station

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[1] The date of Ball's conviction and sentence was June 8, 1962, and his probationary period was to extend five years from that date.

proprietor. Once again Ball separated the two combatants. Bailey was arrested for drunkeness. Ball, however, was not arrested. The probation officer stated that Nash, Lancaster and Bailey were persons of bad character and reputation, with extensive criminal records.

The probation officer added that on June 8, 1964, Ball was found slumped over the steering wheel of his car, the motor running, on a paved road approximately two miles from his home. The time of this occurrence was about 10 or 10:30 a.m.[2] The person who discovered Ball concluded that he was in no condition to operate an automobile and drove him home.

It is not disputed by Ball that the two altercations occurred and that he was found slumped over the steering wheel of his car. However, he asserted at the first hearing that he had not voluntarily kept bad company. He claimed rather that Lancaster came to his home prior to the Louisburg trip and told him that he wanted to go to Ball's store, which was closed, to make a purchase. Ball contended that he got into Lancaster's car thinking that he was merely going to serve a customer, but that once he was in the car, Lancaster refused to stop until they got to Louisburg.

Ball flatly denied drinking any alcoholic beverages during the period in question. In addition to producing a number of character witnesses who were willing to testify that his reputation since his liquor conviction had been that of a law-abiding citizen, Ball offered an affidavit of a Louisburg police officer, who investigated the service station fight, to the effect that Ball had not appeared intoxicated. However, Ball's principal line of defense to the

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[2] The stated time of the incident was fixed by Ball himself at the second hearing, which is further discussed *infra*.

drinking charge was that during the period from June 6 to June 8, 1964, he was suffering from a bad tooth and was under heavy sedation, which may have caused him to appear as though he had been drinking. Ball stated that a dentist had extracted the aching tooth for him on the evening of June 6, 1964, and had given him prescriptions for drugs which he took during the period in question. He further stated that he had gone to the hospital on June 8, 1964, and that what appeared to be a piece of bone (which he claimed had been broken off during the extraction) was removed from his jaw. According to Ball he did not see his dentist on June 8, 1964.

Ball also claimed that, except as to the service station fight, he had no notice of the charges which the probation officer pressed against him and he was thus taken by surprise.

Although the court later revealed[3] that it was of the opinion that there was ample evidence adduced at the first hearing to justify revocation of Ball's probation, it decided to give him the "benefit of every doubt" and did not then revoke his probation. The court, however, did direct the probation officer to inquire of Ball's dentist as to the nature of the drugs prescribed and his opinion as to what effect they might have had upon Ball.

The probation officer reported to the court, at a hearing held on June 3, 1964, the results of his further investigation. The records of Dr. Eakes, the dentist who had treated Ball, revealed that Ball's tooth was extracted on Monday, June 8, 1964, rather than on June 6, 1964, as Ball had contended at the first hearing. Dr. Eakes was present at

[3] The Court's disclosure of this view occurred at the second hearing.

the second hearing and testified that the extraction was performed after 9 o'clock in the evening. The probation officer further reported that a check of hospital records revealed no visit by Ball for any purpose during the period in question.

Ball admitted at the second hearing that he had not gone to the hospital. He stated instead that his wife had removed what appeared to be a piece of bone from his jaw with a pair of tweezers in their home. His only explanation for this misstatement at the first hearing was, "I just got my days and things mixed up." He admitted also that he had mistakenly represented at the first hearing that the extraction of his tooth had occurred on June 6, 1964, explaining that his mistake was attributable to his lack of opportunity to check on the date.

Ball nevertheless insisted that he had been under heavy sedation for relief from his toothache throughout the period of his alleged spree. He testified that he visited Dr. Eakes at his home in the early morning hours of June 6, 1964; that he was given a prescription and that he took the prescribed capsules, along with Anacin, BC and aspirin tablets, from June 6 to the time of the extraction on the evening of June 8. Dr. Eakes verified that Ball had visited him early on the morning of June 6. However, he could not remember whether he prescribed medicine for Ball, or what type it might have been. From uncontradicted affidavits of two drugstore employees introduced by Ball, it appears that Ball purchased, on June 6, 1964, some APC capsules pursuant to a memorandum written on a prescription form by Dr. Eakes. According to Dr. Eakes, an APC capsule is a little stronger than Anacin and may be purchased without a prescription although he wrote Ball a memorandum for it on a prescription blank. Dr. Eakes

stated that APC capsules, taken as directed, could not cause an average individual to appear intoxicated.

In its order of June 11, 1965, the District Court revoked Ball's probation on the following grounds:

> "1—He has failed to follow the Probation Officer's instructions and advice.
>
> "2—He has violated a State Law.
>
> "3—He has failed to keep good company.
>
> "4—He misrepresented the facts as presented to the Court during a violator's hearing on August 12, 1964."

Since revocation of probation lies within the sound discretion of the sentencing court, *United States v. Taylor,* 321 F.2d 339 (4 Cir. 1963), the only question before us is whether the District Court abused its discretion.

The probation officer reported information from sources which he considered reliable to the effect that Ball had been drinking and driving while under the influence of intoxicants. However, the court did not act upon this report to revoke Ball's probation. Persuasive evidence of Ball's drinking and driving while under the influence of intoxicants is supplied by the uncontradicted fact that he was found in mid-morning on a paved road, slumped over the steering wheel of his car with the motor running. At the first hearing the District Court accepted, subject to further investigation by the probation officer, Ball's explanation that his condition was caused by sedative drugs prescribed for him following the extraction of an aching tooth. How-

ever, at the second hearing evidence was adduced from which the District Court could reasonably conclude that Ball's condition when he was found slumped in his car was not attributable to drugs. Ball's own evidence reveals that he was taking nothing but APC capsules *at the direction of Dr. Eakes* during the relevant period. It was Dr. Eakes' professional opinion that such capsules could not, if taken in the directed dosage, cause a normal person to appear intoxicated. The court was not compelled to accept Ball's unsupported statement, obviously intended to provide a plausible explanation of his condition, that he was taking preparations such as aspirin, Anacin and BC tablets in addition to APC capsules.

The permissible inference of intoxication is bolstered by Ball's factual misrepresentations to the court concerning his tooth troubles. We find no logical reason for his attempt to mislead and deceive the court other than a desire to conceal the true cause of his condition. His distorted version of the sequence of events might well have been calculated to persuade the court that his tooth was pulled on June 6 and that he was thereafter attempting to relieve his pain by taking large quantities of sedatives until the morning of June 8 when a piece of bone was removed from his jaw *at the hospital.* In this context we find no merit in Ball's argument that his misrepresentations were not material.

There is authority for the proposition that evidence which will justify revocation of probation need not be sufficient to support a criminal conviction. See *Yates v. United States,* 308 F.2d 737 (10 Cir. 1962); *Manning v. United States,* 161 F.2d 827 (5 Cir. 1947).

> "All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the

conduct of the probationer has not been as good as required by the conditions of probation." *Yates v. United States, supra,* at 739.

One of the reasons assigned by the court for revoking probation was that Ball had failed to keep "good company." While Nash, a person of recognized bad character, was involved in an altercation in Ball's presence on June 7, 1964, it would not necessarily follow that Ball was keeping bad company since Nash was in Ball's store, a place of business open to the public. More persuasive, however, are the facts that later on the same day Ball went to Louisburg with Nash, Bailey and Lancaster, and that all three of Ball's companions were of bad character and repute. The court was not bound to accept the assertion that Ball was virtually a captive and an unwilling associate of that unruly trio.

We are not persuaded that the court abused its discretion in revoking Ball's probation.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1249

GRAHAM BOBBITT BALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966. The petition for a writ of certiorari was filed on April 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in revoking petitioner's probation by relying, in part, upon the fact that petitioner had misrepresented facts at a previous hearing.

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2. Whether the court improperly relied upon hearsay in revoking probation.

STATEMENT

On June 8, 1962, petitioner pleaded guilty in the United States District Court for the Eastern District of North Carolina to two counts of an indictment charging concealment and possession of nontaxpaid whiskey. He was sentenced to imprisonment for three years on Count 1 and one year on Count 2, the terms to run consecutively. Execution of the sentences was suspended and petitioner was placed on probation for five years. Among the terms of the probation were that petitioner not violate state penal laws, that he live a clean and temperate life, and that he keep good company (Pet. App. 2A).

On August 12, 1964, at a hearing to determine whether petitioner's probation should be revoked for violating these three conditions, the court continued probation but instructed the probation officer to make further inquiry into the charges and report his findings at a subsequent hearing. At the second hearing, in June, 1965, the court revoked petitioner's probation, ordered him to serve 6 months in prison, and placed him on probation for two years thereafter. The court of appeals affirmed (Pet. App. 1A–8A).

At the first probation revocation hearing, in August, 1964, the probation officer stated that, on June 9, 1964, he had received an anonymous telephone report that petitioner had been drinking and driving through the community in that condition (Tr. 4).[1] The officer

[1] The three-volume record, including the transcript of trial, has been filed with the Clerk of this Court.

conducted an investigation and interviewed approximately a dozen neighbors and acquaintances of petitioner, all of whom he considered reliable (Tr. 4). He concluded that there was reason to believe that from June 5 to June 8, 1964, petitioner had violated the terms of his probation by appearing in public and driving while intoxicated and by associating with individuals of questionable reputation (Tr. 3–8). The officer also reported that on June 7, petitioner intervened to prevent a fight in his grocery store between two individuals, one of whom, Nash, had an undesirable reputation (Tr. 7). Later that day petitioner rode to Louisburg, North Carolina, in the company of Nash and two others, one of whom was intoxicated. The driver, Lancaster, refused to pay for gasoline at a service station, and engaged in a fight with the service station attendant. Petitioner separated the combatants. Lancaster and the intoxicated passenger, who both had extensive criminal records, were arrested (Tr. 5–6, 42). On the morning of the next day, June 8, petitioner was seen on a rural road two miles from his home slumped over in his car while the motor was running. A neighbor drove him home (Tr. 7).

Petitioner denied drinking at any time during the period of time in question. He admitted being compelled to intervene in two fights on June 7. The first occurred at his grocery store between customers. As to the second incident, petitioner stated that Lancaster had come to his house to request a purchase from petitioner's store, which was closed; that petitioner accepted a ride to the store; that against petitioner's wishes Lancaster drove to Louisburg, where the alter-

cation occurred; and that petitioner was not involved in the fight (Tr. 14). With regard to the incident on the highway, petitioner stated that he had a tooth extracted on June 6, and that the dentist had given him a prescription for drugs which placed him under heavy sedation and may have caused him to appear intoxicated. Petitioner further stated that he had gone to a hospital in connection with the tooth extraction on the morning of June 8, 1964, where a piece of jaw bone was removed (Tr. 20).

After hearing this evidence and the testimony of one of the eleven available character witnesses on behalf of petitioner, the court gave petitioner "the benefit of every doubt" and continued him on probation. The judge requested the probation officer to interview the dentist who petitioner alleged had extracted his tooth and to report his findings (Tr. 39–45).

A second hearing was held on June 3, 1965. The dentist testified that, on June 6, 1964, petitioner came to his office at 6:30 a.m., complaining of an infected tooth, and was given a prescription for tablets to relieve pain. The tablets contained no narcotics and were merely a compound of aspirin (Tr. 85, 87). The dentist did not see petitioner again until after 9 p.m. on June 8, when he performed the extraction (Tr. 73-75). The probation officer advised the court that his examination failed to uncover any recent hospital record for petitioner (Tr. 4, 54). Petitioner, through counsel and later by his own testimony, admitted that he had been "mistaken" about his trip to the hospital (Tr. 71, 101)). He insisted, however, that he was under the influence of various tablets which he had

taken to excess to relieve the pain of the bad tooth (Tr. 110–115). The court expressed its concern that petitioner had changed his story, and revoked petitioner's probation on four grounds: failure to follow the probation's officer's instructions and advice; violating a state law; failing to keep good company; and misrepresenting facts at the August hearing (Pet. App. 6A).

ARGUMENT

1. Petitioner does not dispute the fact that intentional misrepresentations of fact on his part at the first hearing would afford a basis for subsequent revocation of his probation. He urges, however, that, at the first hearing, "[n]either the probationer nor his attorneys had any knowledge of any of the charges except the altercation at the filling station in Louisburg, N.C., and therefore the probationer was called upon without any prior notice to give the details of his severe toothache * * *" (Pet. 7–8) and thus that his misstatements at the first hearing regarding the tooth extraction and its surrounding circumstances were "nothing more than a mere erroneous statement of immaterial facts due entirely to lack of notice and knowledge on the part of the probationer and his attorneys as to what the charges were against him" (Pet. 14).

The question whether petitioner deliberately misrepresented facts at the first hearing was an issue of fact primarily entrusted to the resolution of the trial judge who presided at both hearings. Both the judge and the court of appeals (Pet. App. 7A) concluded that the representations had, in fact, been designed to

mislead the court. There is no occasion for further review of this factual determination, especially in light of the fact that the first hearing took place less than three months after the incident in question, when petitioner's memory of the facts could be expected to be relatively reliable. Finally, the alleged failure of formal notice, prior to the first hearing, that the events surrounding the tooth extraction would be relevant, obviously did not privilege petitioner deliberately to lie about those events. Cf. *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955.

2. Nor is there merit to petitioner's contention that the revocation of his probation—insofar as it was grounded upon bases other than his misrepresentation of facts at the first hearing—improperly rested entirely upon hearsay (Pet. 14–16). At the second hearing, the court advised defense counsel that he would not require a confrontation, but would rely on the report of the probation officer, who knew that he must discount mere rumor when making his investigation and recommendations. Counsel voiced no objection to this procedure (Tr. 68). Moreover, petitioner did not deny his association with disreputable characters or his unfit condition on a public road, but offered an explanation for his actions which the judge deemed unsatisfactory. Each charge against petitioner was fully and individually considered. Petitioner was adequately represented by counsel and had a full opportunity to present his version of the facts through his own testimony. See *Manning* v. *United*

States, 161 F. 2d 827 (C.A. 5), certiorari denied, 332 U.S. 792.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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